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No.

IN THE
SUPREME COURT OF THE UNITED STATES

①

Supreme Court, U.S.
FILED
MAR 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

JOHN MELLETT,

Petitioner

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
SIDNEY L. AARESTAD, JACK C. PLEASANT
AND B.C. MULLICAN, individually and in
their representative capacity,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOHN MELLETT
Pro Se Petitioner
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Edina, MN 55435
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53P

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR
HARD COPY AT THE TIME OF FILMING.
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OBTAINED, A NEW FICHE WILL BE
ISSUED.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Eighth Circuit Court err when it decided disputed facts in the defendants favor? Did the petitioner file a timely grievance?
2. Is laches an affirmative defense for the denial of Due Process when government statutes, regulations and policies have been violated?
3. Did the Eighth Circuit Court err in ruling that the petitioner should have appealed the Merit Systems Protection Board decision to the Federal Circuit? Does the ruling conflict with Congressional Mandate?
4. Did the petitioner have property and liberty interests in his within-grade increase?
5. Did the Eighth Circuit Court err in dismissing petitioner's cause of action under the Privacy Act?

PARTIES IN THE UNITED STATES COURT OF
APPEALS

John Mellett, petitioner herein, filed
as petitioner in the United State Court of
Appeals For The Eighth Circuit. His peti-
tion named the Federal Deposit Insurance
Corporation, Sidney L. Aarestad, Jack C.
Pleasant, and B.C. Mullican.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

The petitioner, John Mellett, prays
that a Writ of Certiorari issue to review
the opinion of the United States Court of
Appeals for the Eighth Circuit entered in
this proceeding on November 19, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals is unpublished. The opinion of the District Court appears to be unpublished, but can be located in West Law. The opinion and order of the Merit Systems Protection Board is unofficially reported at 22 MSPR P. 655. The initial decision of the Merit Board appears to be unreported. The opinion of the Court of Appeals, the opinion of the District Court, the opinion of the Merit Board and the initial decision of the Merit Board are set out in the Appendix hereto.

JURISDICTIONAL STATEMENT

Petitioner seeks review of the judgment of the Court of Appeals entered on November 19, 1986. A timely petition for rehearing was denied by the Court of Appeals on December 15, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS AND POLICIES INVOLVED

This case involves the due process clause of the Fifth Amendment to the United States Constitution, the following statutes:

5 U.S.C. 2301(b)(2)
5 U.S.C. 2302 (C)
5 U.S.C. 552a(g)(1)
5 U.S.C. 552a (d)(1)
5 U.S.C. 5335
18 U.S.C. 1001

the following regulations:

12 C.F.R. 336.735-31(b)(3)
12 C.F.R. 336.735-38
12 C.F.R. 336.735-41
12 C.F.R. 336.735-42(b)
12 C.F.R. 336.735-31a(8)
5 C.F.R. 771.302 (f)(1)

the following Federal Deposit Insurance Corporation policies:

Circular 2140.1 10.b(1),
14a, 14c, and 14 d.

Within-Grade Increases
Policy 2-4 A
3-4 B(1)
2-3 B
Appendix D
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The constitutional provisions,
statutes, regulations and policies are set
out in the Appendix.

STATEMENT OF THE CASE

On October 28, 1983, defendant B.C. Mullican refused to hear petitioner's grievance appealing the redetermination of petitioner's denial of within-grade increase. The reason defendant Mullican gave for refusing to hear the grievance was that it was untimely filed.

On November 8, 1983, defendant Jack Pleasant refused petitioner the right of access to the formal grievance procedure in the matter.

Following is a summary of events concerning petitioner's denial of within-grade increase, petitioner's history with the Federal Deposit Insurance Corporation (FDIC) and a summary of petitioner's attempt to be heard in this matter.

On September 29, 1983, defendant B.C. Mullican received from petitioner a notice formally advising him that petitioner was scheduled to have a diseased kidney removed on October 6, 1983. On that day, defendant

B.C. Mullican, then FDIC Regional Director, Minneapolis Region, and defendant Sidney Aarestad, who was then petitioner's supervisor, prepared and signed a document, "Re-determination of Denial of Within-grade Increase", denying petitioner his increase from grade 12, step 4 to grade 12, step 5. The document stated "If you feel that this determination is improper you may contest the basis for it through the Corporation's grievance procedure". The document did not mention a time limit for filing a grievance, nor did it tell petitioner where he should send his grievance.

On Friday, September 30, 1983, at approximately 11:30, defendant Sidney Aarestad told petitioner that Regional Office personnel wanted to meet with petitioner that afternoon to discuss petitioner's impending surgery.

At 3:00 on September 30, 1983, petitioner went to defendant B.C.

Mullican's office. Waiting in the office were defendant B.C. Mullican, defendant Sidney Aarestad and Assistant Regional Director Kevin Murphy. Sidney Aarestad gave petitioner the document "Redetermination of Denial of Within-grade Increase". He told petitioner to read it, sign it, and date it. Petitioner read the document and asked defendant Aarestad, "Why didn't you tell me what this (meeting) was really about?" Petitioner refused to sign the document. Defendant Mullican then told petitioner that it really didn't matter if he signed the document because it could be witnessed by the other two people in the room. Petitioner signed the document.

After the meeting, petitioner went home and wrote a grievance to James Sexton, then-Director, Division of Bank Supervision. The grievance protested the use of deceit in the personnel action and asked Director

Sexton to "defer or terminate" the matter.

On October 3, 1983, petitioner returned to work to finish a compliance report. The reason petitioner returned to work to finish this report was that petitioner believed he was about to be terminated from his job. On September 7, 1983, defendant Sidney Aarestad had had a meeting with petitioner to tell him that on September 2, 1983, defendant B.C. Mullican had recommended petitioner's termination because FDIC Ethics Counselor Hoyle Robinson had received petitioner's confidential Statement of Employment and Financial Interests 29 days late and petitioner had not explained in writing to B.C. Mullican why he had filed the Statement late. The document "Redetermination of Denial of Within-grade Increase" which petitioner received on September 30, 1983, also cited petitioner's late Statement of Employment and Financial Interests as the specific reason for the

denial of his within-grade increase. By letter dated September 9, 1983, petitioner had explained to defendant Mullican why his Statement of Employment and Financial Interests had been filed late. Therefore, the Redetermination document cites petitioner for an untimely explanation of why his Statement was filed late.

Petitioner completed his compliance report by noon on October 3, 1983. Petitioner requested the rest of the afternoon to spend time with his family before surgery. Petitioner was scheduled for presurgical tests on October 4 and October 5, 1983. During this time, petitioner was extremely concerned about his health. In July 1982, petitioner had suffered a heart attack. In addition to the painkilling medication that had been prescribed for his kidney pain, petitioner was taking three medications to control his high blood pressure. Petitioner was the sole support of his

family. Petitioner was concerned about losing his job and his medical insurance.

Petitioner received no reply to his September 30, 1983, grievance to Director James Sexton. While petitioner was recuperating from his surgery, he began to study both FDIC and federal government policies and regulations. Petitioner also began to put together what had happened to him. Petitioner concluded that defendants broke FDIC policies and regulations.

Petitioner began working for the FDIC on January 18, 1971. Between 1971 and 1979, petitioner passed a promotional examination, became an examiner and advanced to the grade 12 level. The petitioner received no adverse personnel actions of any kind until July 22, 1983. Before work on the morning of July 20, 1983, petitioner delivered to the FDIC Regional Office a report which was due on the evening of July 19, 1983. On July 22, 1983, petitioner was called to the Region

Office and given an "Official Letter of Reprimand". The Letter of Reprimand cited two late examination reports. This letter was placed in the petitioner's personnel file. The Letter stipulated that the Reprimand was to remain in the petitioner's personnel file "for a period of not less than two years nor more than three years". This was the first adverse action petitioner had received in his career.

Fourteen days later, petitioner received a second adverse action. On August 5, 1983, when petitioner was on an assignment of about 60 miles out of town, a fellow examiner told him to call defendant Sidney Aarestad. Defendant Aarestad told petitioner to meet him at the FDIC Field office at 3:30 that afternoon. Petitioner has the Northwestern Bell record of this long-distance call. At the meeting, defendant Aarstad gave petitioner the written advance notice that petitioner's within-

grade increase, which petitioner was scheduled to receive on August 21, 1983, was being denied. The document stated that the within-grade increase was being denied because of the same two late examination reports which had been cited in the "Official Letter of Reprimand". The document also stated that petitioner had a full 60 days to improve his performance.

As noted above, on September 2, 1983, 28 days after petitioner received his second adverse action, defendant Mullican recommended petitioner's termination. 28 days after recommending petitioner's termination, defendant Mullican denied petitioner's within-grade increase. Within 70 days, from July 22, 1983 to September 30, 1983, Defendant Mullican had taken four adverse actions against petitioner.

Because petitioner had received no reply to the grievance sent to Director Sexton, on October 26, 1983, Petitioner

sent a grievance appealing the denial of his within-grade increase to defendant Mulligan. Petitioner's grievance identified nine reasons why the denial of his within-grade increase should be reversed. These reasons included: 1) that petitioner was not given a full 60 days notice period. 2) that the "offense" of submitting a late financial statement occurred before the notice period began, i.e., the Statement was supposed to be submitted on July 31, 1983, the notice period began on August 5, 1983. 3) that twice, petitioner had been twice-punished for the same specific reason. 4) that petitioner was not receiving equal treatment, i.e., other employees had filed late Statements of Employment and Financial Interests and other employees, including petitioner's own supervisor, had filed late examination reports. 5) that FDIC regulations delegate responsibility for

employee financial statements to the FDIC ethics counselor and that defendant Mullican not only breached petitioner's right to confidentiality, but also exceeded the scope of the Regional Director's authority in punishing petitioner regarding the late financial statement.

Before filing the grievance with Regional Director Mullican, petitioner had called FDIC Employee Relations Chief, George Turrentine, to inquire whether the United States Merit System Protection Board (hereinafter, the MSPB or Board) had jurisdiction over FDIC denials of within-grade increases. Mr. Turrentine said that the MSPB did not have such jurisdiction. He told petitioner that his only option, other than the FDIC's grievance system, was to sue the FDIC in court.

In spite of Mr. Turrentine's advice, on October 26, 1983, the petitioner sent his grievance to the MSPB, as well as to

defendant Mullican. On October 29, 1983, when petitioner received defendant Mullican's refusal to hear his grievance, petitioner again requested the Board's jurisdiction.

On October 31, 1983, petitioner sent his grievance to defendant Pleasant. Petitioner's cover letter requested defendant Pleasant to hear petitioner's grievance because 1) Defendant Mullican was a participant in the original decision 2) disputed facts should be resolved and 3) petitioner's grievance raised serious questions.

During this time, petitioner was at home recuperating from the surgery that removed his kidney. Petitioner returned to work on November 21, 1983.

On November 16, 1983, petitioner received a letter, dated November 9, 1983, from the MSPB. The letter stated that the Board had no jurisdiction over FDIC salary increase denials. The letter also stated

that the Special Counsel did not have the authority to investigate prohibited personnel practices of government corporations.

On November 14, 1983, petitioner received advance notice from defendant Pleasant that he would be terminated in 30 days. Also on November 14, 1983, petitioner requested certain documents and information from defendant Mullican. Among the documents petitioner requested were the signed, dated copy of the August 5, 1983, advance notice of denial of within-grade increase and the earlier approval of that increase. Petitioner received the signed and dated August 5, 1983, copy of the advance notice. However, regarding the earlier approval of petitioner's within-grade increase, defendant Mullican wrote: "Our records contain no documents responsive to Item 4 of your request". Defendant Mullican forwarded the informational requests to the FDIC's Washington Office.

Petitioner subsequently received a package, together with an undated cover letter signed by Alfred Squerini for defendant Pleasant, from the FDIC's Washington Office. The letter stated that the package contained all documents in the petitioner's personnel file. Among the documents was a confidential Statement of Indebtedness of a senior FDIC official. Petitioner believes that he immediately would have been terminated if he had inadvertently violated the senior official's right to confidentiality.

On December 2, 1983, petitioner formally appealed the denial of his within-grade increase to the MSPB, Chicago Regional Office. Petitioner stated that one of the reasons the denial of his within-grade increase should be reversed was that it had earlier been approved by petitioner's acting-supervisor. Petitioner later sent the Board a notarized statement from his acting

supervisor confirming that he had indeed approved petitioner's within-grade increase.

On December 8, 1983, defendant Mullican told petitioner that he would withdraw his recommendation for petitioner's termination if petitioner would accept a two-week suspension without pay. In view of petitioner's health problems, petitioner accepted the suspension.

On February 29, 1984, the MSPB, Chicago Regional Office, ruled that it did not have jurisdiction over FDIC denials of within-grade increases. On July 6, 1984, the Washington Board affirmed the decision.

On April 1, 1986, the United States District Court, Fourth Division, dismissed petitioner's claim for violation of due process and violation of the Privacy Act. The Court ruled that petitioner had not exhausted his administrative remedies. On November 19, 1986, the United States Court of Appeals for the Eighth Circuit affirmed

the District Court's decision. On December 15, 1986, the United States Court of Appeals for the Eighth Circuit denied petitioner's request for a rehearing.

REASONS PETITION SHOULD BE GRANTED

1. THE EIGHTH CIRCUIT COURT ERRED IN DECIDING DISPUTED FACTS IN THE DEFENDANTS' FAVOR.

The rationale for the Eighth Circuit Court's decision is based on two disputed facts. The disputed facts are: 1) the dates that petitioner received written notifications denying his within-grade increase 2) whether or not petitioner filed a timely grievance. Petitioner asserts that he received the advance notice of denial of within-grade increase on August 5, 1983. Petitioner asserts that defendants' written statement in the Redetermination of Denial of Within-grade Increase that the advance notice was "issued" to him on August 1, 1983, is false, allows defendants to appear to be complying

with Corporation policy and confers a legitimate rather than a malicious intention on defendants' September 30, 1983, meeting with petitioner. Moreover, petitioner asserts that one of the reasons Defendant Mullican refused to hear petitioner's grievance is because the August 1 date is false. The signed, dated copy of the advance notification verifies that petitioner received the document on August 5, 1983.

Petitioner wrote a timely grievance to Director James Sexton on September 30, 1983, the first day of the grievance period. FDIC Circular 2140.1, 14. c. authorizes divisional directors to receive grievances.

2. IS LATCHES AN AFFIRMATIVE DEFENSE FOR THE DENIAL OF DUE PROCESS WHEN GOVERNMENT STATUTES, REGULATIONS AND POLICIES HAVE BEEN VIOLATED?

If petitioner's grievance had been heard, the denial of his within-grade increase would have been reversed. Petitioner's

within-grade increase had been approved approximately 90 days before it was due by petitioner's acting-supervisor. This is in accordance with FDIC Within-grade Increases Policy 2-4 A. When defendants Mullican and Aarestad denied the petitioner's within-grade increase, they broke the following policies and regulations:

1. Petitioner was not given a full 60 days between receiving the advance notice and the negative redetermination. Within-grade Increases Policy, 3-4, B (1).
2. The negative redetermination was not based on petitioner's work as described in his position description. Within-grade Increases Policy, 2-3 B and Appendix D.
3. The defendants exceeded the scope of their authority when they punished petitioner for a financial statement matter. 12 C.F.R. 336.735-

42 (b). Defendants used an irrelevant basis for making the adverse determination. 5 U.S.C. 552a (g)(1)(C).

4. Because other FDIC employees also submitted late financial statements, defendants did not treat petitioner "fairly" and "equitably". 5 U.S.C. 2301 (b) (2).

5. Defendants twice-used the same exact alleged offense as the basis for two adverse actions in order to trump up an adverse personnel record on the petitioner.

6. Defendant Mullican violated petitioner's right to confidentiality. 12 C.F.R. 336.735-38.

7. Defendants falsely wrote that the advance notice was "issued" on August 1, 1983. 5 U.S.C. 552a (g)(1)(C). 18 U.S.C. 1001.

8. The determination was not

"reasoned and objective". With-
in-grade Increases Policy 2-3.B.

9. Defendants maliciously deceived petitioner regarding the purpose of the September 30, 1983, meeting.
10. Defendants falsely attested in the Redetermination document that "the action is in accordance with the Corporation's Policy on Within-grade increases".

Defendant Mullican was deeply involved in the negative determination and therefore was not "qualified" to determine whether petitioner's grievance should be heard.

5 C.F.R. 771.302 (f)(1). The responsibility for a fair decision was up to defendant Pleasant. Petitioner had advised defendant Pleasant that defendant Mullican was a participant in the original decision, that there were disputed facts and that the grievance raised serious questions.

Court Rulings have established that

before the doctrine of latches can be applied, defendants must show 1) a delay 2) that the delay was inexcusable 3) that the delay resulted in prejudice to the agency. Gardner v. Panama R. Co., 342 U.S. 30-31, S.Ct. at 13, 96 L.Ed. 31 (1951).

Petitioner argues that there was no delay; he sent a grievance to James Sexton on the first day of the grievance period. Defendants Mullican and Pleasant were aware of this grievance. In his refusal to hear petitioner's grievance, defendant Mullican stated, "You have indicated that a letter was written to Director Sexton on September 30, 1983, which would indicate that you were physically able to file a grievance prior to the time of your surgery on October 6, 1983". In refusing petitioner access to the formal grievance system, defendant Pleasant wrote, "Your own letter states that you wrote to Mr. James Sexton...on this matter, which would indicated that you could have

filed a timely grievance". Moreover, defendant Mullican was aware that petitioner believed the negative determination was improper because petitioner had refused to sign the document.

Petitioner argues that the 11-day delay in filing the grievance was excusable because 1) During the 15-day grievance period, petitioner's diseased kidney was removed. 2) The Redetermination document did not mention a time limit for filing a grievance or to whom the grievance should be sent, which should have been the agency's responsibility. 3) Petitioner expected a response from Director Sexton. Petitioner is not a member of a union and had never written a grievance before September 30, 1983. Petitioner argues that the brief, 11-day delay did not result in prejudice to the agency. In fact, FDIC Circular 2401.1 14 a allows for a 15-day extension of the time limit. Petitioner's grievance

to Mullican was submitted within the extension period, i.e., on October 26, 1983.

3. DID THE COURT ERR IN RULING THAT PETITIONER SHOULD HAVE APPEALED THE MSPB DECISION TO THE FEDERAL CIRCUIT? DOES THE RULING CONFLICT WITH CONGRESSIONAL MANDATE?

Defendants refused to hear petitioner's grievance, thereby violating his due process rights. The FDIC has the burden to protect employees' due process rights in denial of within-grade increase matters. FDIC Within-Grade Increases Policy, 3-7, states that employees may grieve a negative determination through the Corporation's grievance policy. FDIC grievance policy, Circular 2140.1, 10. b. states, "These grievance procedures do not apply to: (1) A matter which is appealable to the Merit Systems Protection Board or subject to final administrative review outside the Corporation..." 5 U.S.C. 2301 (b)(2) states that all executive agencies, without exception, must en-

sure "fair and equitable" treatment for all employees "with proper regard for their privacy and constitutional rights". The MSPB twice-ruled that the Board has no jurisdiction over FDIC denials of within-grade increases. 5 U.S.C. 5335 allows General Schedule pay system employees to appeal within-grade denials to the MSPB. FDIC pay systems, however, are either general-graded or liquidation-graded. Within-grade Increases Policy, 1-4. The FDIC's Employee Relations Chief also told petitioner that he could not appeal the matter to the MSPB. Moreover, MSPB Regional Director Martin Baumgaertner wrote petitioner that the Special Counsel has no authority to receive and investigate prohibited personnel practices of government corporations. See 5 U.S.C. 2302, (C)(i). The petitioner virtually has nowhere to be heard. In 5 U.S.C. 2301, Congress placed the burden of protecting constitutional rights on

the agency. The Court's ruling relieves the FDIC of its responsibility for ensuring that employees receive due process.

4. DID PETITIONER HAVE PROPERTY AND LIBERTY INTERESTS IN HIS WITHIN-GRADE INCREASE?

Petitioner had a property interest in his within-grade increase. He had met the conditions for receiving the increase, i.e., 1) he had waited for two years for the increase 2) his acting-supervisor had approved his within-grade increase.

Petitioner had a liberty interest in his within-grade increase. Financial statement matters are properly handled by the FDIC Ethic Counselor and FDIC Chairman of the Board. 12 C.F.R. 336.735-41 (b)(1) and (2). 12 C.F.R. 336.735-42 (b). This is necessary to safeguard employees' reputations. Defendants improper denial of petitioner's within-grade increase will be a permanent part of petitioner's service re-

cord.

5. THE COURT ERRED IN DISMISSING
PETITIONER'S CAUSE OF ACTION UNDER THE
PRIVACY ACT.

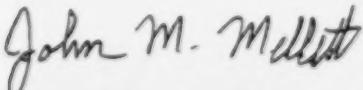
Petitioner is entitled to sue for improperly withheld records, viz., acting-supervisor's approval of petitioner's within-grade increase. 5 U.S.C. 552a (g)(1)(B). 5 U.S.C. 552a (g)(1)(3)(A).

The Privacy Act grants individuals the right to sue for damages when an agency fails to maintain an individual's records with "accuracy, relevance, timeliness and completeness" and a determination is made which is adverse to the individual. 5 U.S.C. 552a(g)(1)(C) and 5 U.S.C. 552a(g)(1)(4). Exhaustion of administrative remedies is not a prerequisite to a suit for damages under the Privacy Act. Nagel v. U.S. Dept. of Health, Education and Welfare, 725 F.2d, 1438, at 1441.

CONCLUSION

Defendants Mullican and Pleasant refused to hear petitioner's grievance, thereby violating petitioner's due process rights. Congress requires agencies to ensure employees' constitutional rights. Defendants Mullican and Aarestad abnegated their responsibility to maintain all records accurately, relevantly and completely. For the foregoing reasons, a Writ of Certiorari should issue to the Eighth Circuit Court ordering it to grant petitioner the right to develop his case at trial.

Respectfully submitted,



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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 86-5181)
John Mellett,) Appeal from the
Appellant,) United States
v.) District Court for
The Federal Deposit) the District of
Insurance Corporation,) Minnesota.
Sidney L. Aarestad,)
Jack C. Pleasant, and)
B.C. Mullican,)
individually and in)
their representative)
capacity.)
Appellees.)

Submitted: September 2, 1986
Filed: November 19, 1986

Before HEANEY, WOLLMAN, and MAGILL,
Circuit Judges.

PER CURIAM.

John Mellett appeals pro se from the district court's¹ order dismissing his action seeking relief from the denial of a within-

¹The Honorable Diana E. Murphy, United States District Judge for the District of Minnesota.

grade salary increase. We affirm the order of the district court.

Mellett is a bank examiner for the Minneapolis Regional Office of the Federal Deposit Insurance Corporation (FDIC). On August 1, 1983, and again on September 29, 1983, Mellett received written notification that he was being denied a within-grade salary increase. Both times the letters advised him that he could contest the action under the FDIC's grievance procedure. Mellett failed to timely file such a grievance. However, Mellett did appeal to the Merit Systems Protection Board (MSPB). The MSPB held it lacked jurisdiction to hear the appeal and explicitly informed Mellett he could seek judicial review of the action by filing a petition with the Federal Circuit within thirty days. Mellett did not file such an appeal.

On September 27, 1985, Mellett filed this complaint seeking damages against the FDIC

and three of its employees, alleging denial of his right to due process, violation of the Privacy Act, 5 U.S.C. § 552(a) (1982), and various torts. The district court granted the FDIC's motion to dismiss. We agree with the district court that Mellett failed to state a cause of action for violation of his constitutional rights. Accordingly, the judgment of the district court is affirmed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

4a

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 865181MN)	
)	
John Mellett,)	Appeal from the
Appellant,)	United States
v.)	District Court for
)	the District of
)	Minnesota.
The Federal Deposit)	
Insurance Corporation,)	
et al.,)	
Appellees.)	
)	

This appeal from the United States District Court was submitted on the record of the district court and briefs of the parties without oral argument.

Upon consideration of the premises, it is hereby ordered and adjudged that the judgment of the district court is affirmed in accordance with the opinion of this Court.

November 19, 1986
Order entered in accordance with opinion.

Clerk, U.S. Court of Appeals, 8th Circuit.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 86-5181-MN)
John Mellett,) Appeal from the
Appellant,) United States
v.) District Court for
The Federal Deposit) the District of
Insurance Corporation,) Minnesota.
et al.,)
Appellees.)
)

Appellant's pro se petition for re-hearing has been considered by the Court and is denied.

December 15, 1986

DISTRICT OF MINNESOTA
FOURTH DIVISION

JOHN MELLETT,)
Plaintiff,)
v.) MEMORANDUM OPINION
FEDERAL DEPOSIT)
INSURANCE CORPORATION,)
SIDNEY L. AARESTAD,)
JACK C. PLEASANT and) Civil No.:
B.C. MULLICAN,) 4-85-1362
individually and in)
their representative)
capacity,)
Defendants.)

ALAN G. GREENBERG, Esq., Suite 1810, 701
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55431, appeared on behalf of plaintiff.

INGEBORG G. CHALY, Esq., Senior Attorney,
Federal Deposit Insurance Corporation, 550
17th Street., N.W., Washington, D.C. 20429,
and MARY E. CARLSON, Esq., Assistant United
States Attorney, 234 U.S. Courthouse,
Minneapolis, MN 55401, appeared on behalf
of defendants.

Plaintiff John Mellett, a Federal
Deposit Insurance Corporation (FDIC)

employee, brought this action for damages against the FDIC and three of its other employees, Sidney Aarestad, Jack C. Pleasant, and B.C. Mullican, individually and in their representative capacities. Plaintiff alleges violations of due process and the Privacy Act, and various torts. At oral argument, plaintiff's counsel stated that the central assertions of his claim were violation of due process and, to a lesser extent, libel. Plaintiff alleges federal question jurisdiction pursuant to 28 U.S.C. § 1331. This matter is now before the court on defendant's motion to dismiss for lack of subject matter jurisdiction, failure to state a claim upon which relief can be granted, and several other grounds.

This case arises from defendants' denial of a salary increase, more specifically a "within grade increase" to

plaintiff Mellett. At the relevant times, Mellett was an Examiner within the Minneapolis Regional Office of the Federal Deposit Insurance Corporation (FDIC). Defendant Aarestad was a Field Office Supervisor, based in Minnesota. Defendant Mullican was a Regional Director and defendant Pleasant was the Director of Personnel, both based in Washington.

In July 1983, defendant Mullican wrote plaintiff an "official letter of reprimand," concerning plaintiff's alleged failure to submit certain reports and other materials in a timely manner and to respond to inquiries seeking explanations for such failings. Plaintiff concedes that these allegations were at least partially true, but asserts that he was "maliciously singled out by defendants and treated differently from other employees ... who engaged in the same alleged misconduct. On

August 5, 1983, plaintiff received a letter, dated August 1, from defendant Aarestad, advising plaintiff that his scheduled within-in grade increase would be withheld. Aarestad wrote that this denial would be reconsidered in 60 days and noted that plaintiff could contest the action under the FDIC's grievance procedure. Plaintiff did not resort to the grievance procedure.

On September 29, 1983, Aarestad informed plaintiff that his within-grade increase would continue to be withheld. He again noted that plaintiff had recourse to the FDIC's grievance procedure. Plaintiff argues that this constituted a denial of due process because the full 60 day notice period required by FDIC policy had not run. Moreover, Mellett claims that the FDIC lacked a valid basis for denying him the within-grade increase.

Circular 2140.1 contains the FDIC Employee Grievance Procedures. It provides that employees in regional offices submit their grievance to the Regional Director within 15 days of the act or occurrence giving rise to the grievance. The official receiving the grievance may extend the time limit an additional 15 days for good cause shown. Plaintiff states that after receiving Aarestad's September 30 notice, he "immediately wrote a letter in the form of a grievance to Defendant (sic) James Sexton, Director, Division of Bank Supervision," and shortly thereafter entered the hospital for major surgery. Plaintiff did not contact defendant Mullican, the proper recipient of any grievance, until October 26, when he sought a fifteen day extension in which to file a grievance. Mullican noted that FDIC officials has not only repeatedly mentioned

the grievance procedure to plaintiff, but had at least once specifically referred him to Circular 2140.1, stated that the grievance had to be submitted within 15 days,¹ and referred plaintiff to an employee relations officer who could provide further information about grievance procedures. Plaintiff asserts that Mullican's refusal to exercise his discretion to permit an untimely filing constituted another denial of due process, as did defendant Pleasant's subsequent refusal to hear a grievance.

A Merit Systems Protection Board (MSPB) hearing examiner denied plaintiff's appeal, finding that the MSPB lacked jurisdiction to hear the appeal. The full MSPB affirmed this decision July 6, 1984, in an order to which explicitly informed

¹ Plaintiff states that he was unaware of this time limitation.

plaintiff that he could seek judicial review of the action by filing a petition with the Federal Circuit within thirty days. Plaintiff did not file such an appeal.

Discussion

A. Due Process Claims

A plaintiff asserting a claim directly under the Constitution must assert a constitutionally protected right and a "cause of action for damages that asserts that right." Bishop v. Tice, 622 F.2d 349, 353 (8th Cir. 1980) (citing Davis v. Passman, 442 U.S. 228, 234 (1979)). In determining whether the second element of this test is met, the court must consider whether Congress has provided an effective alternative to the proposed federal cause of action and whether there exist "special

factors counseling hesitation." Bishop v. Tice, 662 F.2d at 355 (quoting Davis v. Passman, 442 U.S. at 245).

Although plaintiff broadly asserts injury to both liberty and property interest, his only arguable claim is that he has a property interest in the within grade increase.² For the purposes of this motion, the court assumes that defendants have violated plaintiff's protective property interest and that "Congress has provided a less than complete remedy for the wrong". Bush v. Lucas, 462 U.S. 367, 373 (1983). Nonetheless, the court cannot

² Plaintiff's argument that he has a cognizable property interest because his employment contract is continuing rather than temporary is misplaced. Plaintiff's continuing employment is not at issue here; the only "property" arguably injured was plaintiff's interest in his within grade increase.

permit plaintiff to proceed with his claims because there exist "special factors counseling hesitation." Id. at 2411 (citing Bivens v. Six unknown Federal Narcotics Agents, 403 U.S. 388, 396 (1979)).

The courts have long recognized the special relationship between the government and its employees, and the special nature of policy questions relating to government employment, see, e.g., United States v. Standard Oil Co., 332 U.S. 301 (1947). Congress has protected civil servants by "an elaborate, comprehensive scheme that encompasses substantive provision forbidding arbitrary action by supervisors and procedures -- administrative and judicial -- by which improper action may be redressed." Bush v. Lucas, 462 U.S. at 385. In light of this elaborate remedial system, the Supreme Court has refused to recognize

a cause of action alleged by a civil service employee who claimed that he was fired for exercising his First Amendment rights. Bush v. Lucas, 462 U.S. 367 (1981).

Plaintiff Mellett alleges that he has been denied a "with-in grade increase" not his job. He had recourse to an administrative remedy but failed to invoke it.³ Government agency supervisors must

³ Plaintiff also sought relief from the MSPB and argues that its determination that it lacked jurisdiction to hear his claim denies him due process. The court notes that the MSPB decision was appealable to the Court of Appeals for the Federal Circuit and that plaintiff apparently failed to make a timely appeal. See Turner v. United States Postal Service, 586 F. Supp. 129 (N.D. Ill. 1984) (district court lacked jurisdiction to hear claim properly heard by MSPB and appealable to Federal Circuit). In any event, plaintiff has not named anyone affiliated with the MSPB as a defendant and does not suggest that any of the defendant named had anything to do with the MSPB decision. Plaintiff's allegations regarding MSPB clearly fail to state a claim against any of the defendants in this action.

grant or deny a very large number of such increases each year. It would be both improper and impossible for the federal courts to scrutinize each of these decisions. In light of the existing administrative procedures available, the circumstances of Mellett's case, and the dangers of excessive court involvement in the day-to-day workings of government employment relationships, the court finds that plaintiff has not stated a cause of action for violation of his constitutional rights.

B. Privacy Act Claims

Plaintiff argues that defendants have inserted false information in his personnel records and have concealed or destroyed other records. The Privacy Act, 5 U.S.C. § 552a authorizes civil remedies for improper maintenance of records. See § 552a(g)(1), but as a prerequisite to

bringing such an action the plaintiff must exhaust his administrative remedies under the Act. See Nagal v. United States Department of Health, Education and Welfare, 725 F.2d 1438 (1984). Plaintiff has not exhausted his administrative remedies and this court therefore lacks subject matter jurisdiction to hear his claim.

C. Tort Claims

Plaintiff alleges that defendants are guilty of libel, intentional infliction of emotional distress, and misrepresentation. To the extent that defendants seek to assert these claims against the FDIC or the individual defendants in their representative capacities, the court lacks subject matter jurisdiction both because plaintiff has failed to exhaust his administrative remedies, 28 U.S.C. §§ 2675(a), and because the libel and misrepresentation claims are

claims are barred as exceptions to the FICA. See 28 U.S.C. § 2680 (b).

To the extent that plaintiff asserts these claims against the defendants in their individual capacities, those claims must also fail. Plaintiff did not allege that defendants' statements about him were false; malice is not sufficient to state a cause of action in libel. An essential element of misrepresentation is detrimental reliance; there is no suggestion of such reliance here. To state a cause of action for intentional infliction of emotional distress, defendant must assert that defendants' conduct was extreme and outrageous, e.g., Hubbard v. United Press International, Inc., 330 N.W. 2d 427 (Minn. 1983) (employment discrimination and written and verbal criticism of plaintiff's job performance were not "extreme and outrageous"); he has failed to do so.

If there were any suggestion in the record that an opportunity to submit a second amended complaint would permit plaintiff's claims to survive, the court would grant that opportunity. It seems clear, however, that plaintiff's only remedy for the mistreatment of which he complains was the administrative remedy that he failed to pursue in a timely fashion.

The court recognizes the health problems that plaintiff has experienced and the obvious importance of this case to him, but it concerns a relatively routine government employment matter that not a subject for the federal courts.

O R D E R

Accordingly, based upon the above and all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that defendants' motion to dismiss is granted, and plaintiff's complaint is dismissed in its entirety.

April 1, 1986
Date

/s/Diana E. Murphy
DIANA E. MURPHY
UNITED STATES DISTRICT JUDGE

24a

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

John M. Mellett,)
Appellant,) DOCKET NUMBER
v.) CH531D8410154
Federal Deposit)
Insurance Corporation,)
Agency.)

ORDER

Having fully considered the appellant's petition for review of the initial decision issued on February 29, 1984, and finding that it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, the Board hereby DENIES the petition.

Federal regulations provide at 5 C.F.R. § 531.401 that subpart D (within-grade increases) applies to employees who occupy permanent positions classified and paid under the General Schedule. Since the record establishes that the

appellant is a General Grade employee, rather than a General Schedule employee and since the appellant did not otherwise show Board jurisdiction over his appeal of the agency's denial of his within-grade increase in salary, the presiding official properly dismissed the appeal for lack of jurisdiction.

See 5 C.F.R. § 1201.56(b) (a) (2).

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of their order. 5 C.F.R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by

the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD

/s/Michael H. Haxie

for Paula A. Latshaw
Acting Secretary

July 6, 1984

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
CHICAGO REGIONAL OFFICE

IN THE MATTER OF)
)
John M. Mellett) Decision No.:
) CH531D8410154
 v.)
) Date:
Federal Deposit) February 29, 1984
Insurance Corporation)
)
)
)

INTRODUCTION

By petition filed on November 29, 1983, Mr. John M. Mellet appealed a September 29, 1983 "redetermination" of the denial of a within-grade increase, due August 22, 1983. He was employed by the Federal Deposit Insurance Corporation (FDIC), Minneapolis, Minnesota as a Bank Examiner.

JURISDICTION

Federal employees may appeal to the Merit Systems Protection Board only those

actions for which a right of appeal is granted by law, rule, or regulation. 5 U.S.C.A. § 7701(a) (West 1983). The appellant has the burden of establishing the Board's jurisdiction over the matter appealed. Spiegel v. Department of the Army, 6 MSPB 40 (1981).

The appellant asserts that the Board has jurisdiction over his appeal because the FDIC identified "Reg. 531.409" as the authority under which denied him a within-grade increase. A negative determination after reconsideration of such a denial may be appealed to the Board under Office of Personnel Management (OPM) regulations found at 5 C.F.R. § 531.410 (d) (1983). OPM derives its authority from promulgating these regulations from Chapter 51 of title 5 of the United States Code. Chapter 51 defines "agency" for purposes of pay and allowances by listing seven

organizations or categories of organizations included within the term. The FDIC does not fall within any of the categories listed. See 5 U.S.C.A. § 5102(a) (1) (West 1983). Moreover, Government controlled corporations are specifically excluded from coverage. 5 U.S.C.A. § 5102(a)(1)(i) (West 1983).

The FDIC was established by Congress as a Government corporation. See 12 U.S.C.A. §§ 1811 and 1819 (1983). One director of the FDIC is the Comptroller of the Currency and two are appointed by the President of the United States. The FDIC must make annual reports of its activities to Congress and the General Accounting Office is charged with auditing the financial transactions of the Corporation. 12 U.S.C.A. § 1812 and 1827 (West 1983). Accordingly, I find that, for purposes of 5 C.F.R. § 531, the FDIC is a Government

controlled corporation and, therefore, its employees are not entitled to the regulatory provisions of that part of the code. Thus, the source of the agency's authority for its actions could not have been Part 531 of the Office of Personnel Management (OPM) regulations.

The appellant further argues that American Federation of Government Employees, AFL-CIO, Local 3804 and Federal Deposit Insurance Corporation, 7 FLRA 34 (1981), a decision by the Federal Labor Relations Authority (FLRA), shows that the FDIC is subject to title 5 of the United States Code. He fails, however, to articulate a rational for such a conclusion or how this would show the Board's jurisdiction over the instant appeal. Apparently, the appellant construes the FLRA decision to hold that the FDIC is required by 5 U.S.C. § 301-4305 to

establish a performance appraisal system. A careful reading of that decision reveals that the FLRA did not so hold. It merely held that those particular sections of the Code do not preclude the FDIC from bargaining over a performance appraisal system. There was no discussion of the agency's obligations under Part 531 of the OPM regulations. Accordingly, the FLRA decision does not support the appellant's contentions.

I find that the appellant has not supported his burden of establishing that he has a right to appeal the denial of his within-grade increase to the Board.

DECISION

The appeal is dismissed.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on April 04, 1984 unless a petition for review is filed

with the Board or the Board reopens the case on its own motion.

ADMINISTRATIVE AND JUDICIAL REVIEW

Any party to this appeal, the Director of the Office of Personnel Management, and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. An original and three copies of any petition for review must be filed with the Secretary to the Merit Systems Protection Board, 1120 Vermont Avenue, N.W., Washington, D.C. 20419 no later than the date cited above.

The petition must identify specifically the exception taken to this decision, cite the basis for the exception, and refer to applicable laws, rules, or regulations. The Board may grant petition for review when a party submits written argument and supporting documentation which

tend to show that:

- (1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or
- (2) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

Pursuant to 5 U.S.C. Section 7703(b)(1), (as modified by Section 127 of the Federal Court Improvement Act of 1982, to be codified at 28 U.S.C. Section 1295(a)(9)) the appellant has the right to seek judicial review of the Board's final decision on this appeal. A petition requesting such review must be filed with the U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. Such a petition may not be filed while the case is pending

before the Board. To be timely, the petition for judicial review must be received by the court within 30 days of the final Board decision.

For the Board:

/s/ Phillip N. Miller
Phillip N. Miller
Presiding Official

CONSTITUTIONAL PROVISIONS, STATUTES,
REGULATIONS AND POLICIES.

Constitution

U.S. Const. amend. V:

No person shall be...deprived of life, liberty, or property, without due process of law;....

Statutes

5 U.S.C. 2301

(a) This section shall apply to--

(1) an Executive agency;

...

(b)(2) All employees...should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition and with proper regard for their privacy and constitutional rights.

5 U.S.C. 2302. Prohibited Personnel Practices

...

"(C) 'agency' means an Executive agency, the Administrative Office of the United States Courts, and the Government Printing Office, but does not include--

"(i) a Government Corporation;....

5 U.S.C. 552a(d) Access to Records. Each

agency that maintains a system of records shall--

(1) upon request by any individual to gain access to his record...permit him and upon his request, a person of his own choosing to accompany him, to review the record and have a copy made of all...

5 U.S.C. 552a (g)(1) Civil Remedies. Whenever any agency--

(A) makes a determination under subsection (d)(3) of this section not to amend an individual's record in

accordance with his request, or fails to make such review in conformity with that subsection;

(B) refuses to comply with an individual request under subsection (d)(1) of this section;

(C) fails to maintain any record concerning any individual with such accuracy, relevance, timeliness, and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, or opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(D) fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual,

the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction in the matters under the provisions of this subsection.

...

(3)(A) In any suit brought under the provisions of subsection (g) (1)(B) of this section, the court may enjoin the agency from withholding the records and order the production to the complainant of any agency records improperly withheld from him...

...

(4) In any suit brought under the provisions of subsection (g)(1)(C) or (D) of this section in which the court determines that the agency acted in a manner which was intentional or willful, the United States shall be liable to the individual in an amount equal to the sum of--

(A) actual damages sustained by the individual as a result of the refusal or failure, but in no case shall a person entitled to recovery receive less than the sum of \$1,000;....

5 U.S.C. 5335. Periodic Step-increases.

(a) An employee paid on an annual basis and occupying a permanent position within the scope of the General Schedule, who has not reached the maximum rate of pay for the grade...shall be advanced in pay successively to the next higher rate within the grade...

...

(c) When a determination is made under subsection (a) of this section that the work of an employee is not at an acceptable level of competence, the employee is entitled to prompt written notice of that determination and an opportunity for reconsideration of the determination within his agency.... If the determination is affirmed on reconsideration, the employee is entitled to appeal to the Merit Systems Protection Board....

18 U.S.C. 1001.

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsi-

fies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

12 C.F.R. 336.735-31 (b)(3).1983.

Approval of the Civil Service Commission will be obtained before requiring the incumbent of a position below the GS-13 level to file a statement under this section.

12 C.F.R. 336.735-31a. (1983)

(a) The Corporation has determined that all positions enumerated in paragraphs (b) and (c) of this section meet the criteria described in 336.735-31. Holders of these positions are required to file statements of employment and financial interest....

...

(8) All commissioned bank examiners, as well as other employees of the Division of Bank Supervision who do not regularly examine banks but who are paid at or above the GS-13 level;...

12 C.F.R. 336.735-38. (1983)

The Corporation shall hold statements of employment and financial interest, and each supplementary statement, in confidence. All state-

ments shall be received, reviewed, and retained in the office of the Ethics Counselor who is responsible for maintaining the statements in confidence and shall not allow access to, or allow information to be disclosed from a statement except to carry out the purposes of this part. The Corporation may not disclose information from a statement except as the Chairman of the Corporation or the Chairman of the Civil Service Commission may determine for good cause shown.

12 C.F.R. 331.735-41. (1983)

...

(b) When a statement submitted under 336.735-31 and 336.735-34 or information from other sources indicates a possible conflict between the interests of an employee or Special Corporation Employee and the performance of his or her service for the Corporation:

(1) The Ethics Counselor shall investigate the matter and allow the employee a reasonable opportunity, orally and in writing, to explain why he or she does not believe a conflict or appearance of conflict exists.

(2) The Ethics Counselor shall attempt to resolve the matter expeditiously....

12 C.F.R. 336.735-42. (1983)

...

(b) When, after consideration of

the explanation of the employee or special Corporation employee provided by 336.735-41, the Chairman of the Board decides that remedial action is required, he shall take immediate action to end the conflicts or appearance of conflicts of interest....

...

Remedial action, whether disciplinary or otherwise, shall be effected in accordance with any applicable law, Executive orders, and regulations.

5 C.F.R. 771.302(f):

At any time an employee places a grievance in writing, a written decision, which includes a report of findings and reasons for the determination, made by:

(1) An official at a higher level than any employee involved in any phase of the grievance, except when the head of the agency has been involved....

FBIC Circular 2140.1.

10. Grievance Coverage

...

b. These grievance procedures do not apply to:

(1) A matter which is appealable to the Merit Systems Protection Board or subject to final administrative review outside the Corporation....

...

14 a. Time-limit. An employee may present a grievance concerning a continuing practice or condition at any time. He or she must present a grievance concerning a particular act or occurrence within 15 days of the date of that act or occurrence or the date he or she became aware of the act or occurrence. The individual to whom the grievance is submitted may extend the 15-day time limit for an additional 15 days if the employee gives a good reason for not presenting his or her grievance within that time limit.

...

c. Presenting Grievance under Informal Procedure. An employee may present an informal grievance to the Director of the Division (or equivalent organizational unit) in which he or she is employed, or, if employed in a Region, to the Regional Director.

d. Resolution of Informal Grievance. The Division/Office Director or Regional Director shall make a prompt effort to resolve the grievance and shall advise the employee of the decision within 15 days of the date the grievance was presented. If the grievance was presented in writing, the decision shall be in writing. A Regional Director shall consult with the Director, Division of Bank Supervision, or his designee, prior to issuing any adverse decision but need not consult if the grievance is resolved.

FDIC Within-Grade Increases Policy

1-4. Eligibility for Within-grade Increases--Waiting Periods

The time requirements for eligibility for within-grade rate increases based on the acceptable level of competence provisions for General Graded (GG) and Liquidation Graded (LG) employees are as follows:

For Advancement to:	Waiting Period in Calendar Weeks
Steps 2,3, and 4	52
Steps 5,6, and 7	104

...

2-4....

A. The Office of Personnel Management notifies the responsible Division/Office Head or Regional Director by memorandum (see appendix A, Notice of Eligibility for Within-grade increase) approximately 90 days before the due date....
B. On receipt of the notice, the responsible supervisor reviews and assesses the employee's performance...

FDIC Within-grade Increases Policy

2-3 B.

To determine whether the employee is functioning at an acceptable level of competence, the supervisor must make a reasoned and objective evaluation of total work performance.

This evaluation must be based on the essential work requirements described in the individual's position description....

...

3-7. Employee Rights--Grievance Procedures.

Employees may grieve the basis for a negative determination under this policy through either the Corporation's grievance procedure or the negotiated grievance procedure, as appropriate.

FDIC Within-Grade Increases Policy.

3-4. B. (1)... The letter assures the employee that he/she has a full 60 days to improve his/her performance...

FDIC Within-Grade Increases Policy.

Appendix D--Example of Denial of Within-grade Increase...

...

Since you were not given a full 60 days advance warning notice that I might withhold your step increase, I will reconsider this determination in 60 days. The reconsideration will be based on a review of your work...

